February 4, 2021

By Email Only:

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Dear Mr. Smolock:

Thank you for seeking stakeholder input to modernize and update regulations impacting Pennsylvania workers’ rights to wages and overtime. We are Pennsylvania worker advocates and litigators (see signatory list below) who have decades of experience in this area and are aware of some of the shortcomings of the current system, especially for those workers most at risk of exploitation. Many of the changes outlined in this letter are long overdue from an economic standpoint in terms of the cost of living, such as the definition of a tipped employee, and particularly crucial at this moment given the economic burdens of the pandemic on low wage and frontline service workers. Pennsylvania’s women and minority workers tend to work in the hardest hit industries and face long-term impacts (see [Minority Workers Who Lagged in a Boom Are Hit Hard in a Bust - The New York Times (nytimes.com)](https://www.nytimes.com/2020/06/06/business/economy/jobs-report-minorities.html) and [Stress, delays, and confusion still plague jobless in Pennsylvania, and January brought little relief - pennlive.com](https://www.pennlive.com/news/2021/02/stress-delays-and-confusion-still-plague-jobless-in-pennsylvania-and-january-brought-little-relief.html)). We also believe that the Department of Labor & Industry (“PALI”) has the opportunity to give its investigators better tools with which to enforce its own rules and encourage further exploration.

From a policy standpoint it is important that our regulatory framework be updated so that workers and employers can understand rules that are sometimes obscured by practices that are normalized in industries and workplaces, or by inaccessible caselaw. It should be easier for a worker to find and understand applicable rules that impact on the ability to earn a living.

Because wage and hour law in Pennsylvania is governed by both the Pennsylvania Minimum Wage Act (“PMWA”) and the Pennsylvania Wage Payment and Collection Law (“PWPCL”), we are suggesting changes to both. Below is a summary of our suggestions; we welcome the opportunity to meet in-person to follow up on any of these items. If we are to embark on this process together in Pennsylvania, we believe our efforts need to be comprehensive and thorough as this opportunity may not soon arise again.

We welcome further discussion on all of the below ideas and any others you are considering. Please contact Community Legal Services attorney Nadia Hewka ([nhewka@clsphila.org](mailto:nhewka@clsphila.org)), Winebrake & Santillo, LLC attorney Pete Winebrake ([pwinebrake@winebrakelaw.com](mailto:pwinebrake@winebrakelaw.com)), or Lichten & Liss-Riordan, P.C. attorney Sarah Schalman-Bergen ([ssb@llrlaw.com](mailto:ssb@llrlaw.com)) if and when PALI wishes to discuss potential regulatory changes in more detail. These attorneys will promptly relay any information or requests from PALI to the signatories to this letter.

Below is a list of issues that we believe must be addressed, including some brief comments regarding each issue. We would be delighted to provide PALI with more detailed analysis and draft regulatory language upon request:

1. **Calculating the “regular rate” for overtime-eligible salaried employees**.

In *Chevalier v. General Nutrition Centers, Inc.*, 220 A.3d 1038 (Pa. 2020), the Supreme Court held that the federal fluctuating workweek method of calculating overtime compensation for salaried employees (as set forth in 29 C.F.R. §778.114) is illegal in Pennsylvania. Thus, Pennsylvania salaried employees are entitled to overtime hours multiplied by 150% of their regular rate. PALI should enact a regulation endorsing the *Chevalier* Court’s thoughtful analysis.

*Chevalier* explicitly did not reach the question of whether the “regular rate” should be determined by dividing the weekly salary by 40 hours or by all hours worked. We submit that PALI should enact a regulation clarifying that the salary should be divided by 40. As cogently explained by the *Chevalier* trial court, the “divide by 40” method furthers the PMWA’s legislative purpose:

The purpose of the portion of the PMWA governing overtime was to alter the behavior of employers. The goal was to cause employers to hire new workers in lieu of paying existing employees to work overtime by making overtime more expensive. A construction of the PMWA that allows the use of the fluctuating workweek encourages the use of overtime. A method for calculating overtime that defines “regular rate” as the rate based on a forty-hour workweek creates a substantial financial incentive to hire new employees instead of paying for overtime. Consequently, GNC's use of the fluctuating workweek to calculate plaintiffs' overtime pay violates the PMWA.

*Chevalier v. General Nutrition Centers, Inc.*, 2016 Pa. Dist. & Cnty. Dec. LEXIS 300, \*4-5 (Pa. Comm. Pl., Allegheny Cty. May 11, 2016) (Wettick, J.).

1. **Application of *Chevalier* principles to non-salary payment schemes.**

We also submit that *Chevalier*’s general methodology of paying overtime calculated at 150% of the regular rate should be adopted for various, non-salary payment plans. Under current regulations, a half-time methodology applies to several non-salary plans. *See* 43 Pa. Code §231.43(b) (day rate); *id.* at § 231.43(d)(1)-(2) (piece rate); *id.* at 231.43(d)(3) (basic rate). As explained in *Chevalier*, the PMWA’s important work-sharing goals are furthered when the regular rate is determined by dividing the weekly wages by 40 and then paying employees *extra* overtime pay equaling 150% of the regular rate for each overtime hour. Moreover, as various courts have observed, existing regular rate regulation, *see* 34 Pa. Code § 231.43, is extraordinarily difficult to understand. Applying *Chevalier* principles to all payment schemes would greatly simplify the regulations to the benefit of both employers and employees.

1. **Revisions and additions to the tipped employee regulations.**

The current regulatory framework is outdated or silent on key rules that determine whether a tipped worker is being paid correctly. We are very concerned that the lack of clear rules and enforcement in this area leaves both restaurant owners and restaurant employees extraordinarily confused.

We would be delighted to work with PALI in developing a set of clear regulations that would define the rules applicable to restaurants that take advantage of the current $4.42/hour tip credit in satisfying their minimum wage obligations to servers. Such regulations are crucial in ensuring that servers are not exploited and that severs’ hard-earned tip income is not used to subsidize the restaurants wage obligations to other restaurant employees.

We have many suggestions, including the enactment of clear regulations that would:

* Strictly limit tip pools and use of the tip credit to restaurant employees who primarily, regularly, and directly serve restaurant customers;
* Ensure that the tip-credit is not utilized for hours in which servers perform side-work that does not generate tip income;
* Ensure that customer tips are never diverted to restaurant managers and owners;
* Ensure that restaurants clearly explain the tip credit and its surrounding rules to servers prior to the commencement of their employment and periodically throughout their employment;
* Clarify the difference between service charges and tips; and
* Ensure that servers are not responsible for the payment of credit card service fees.

Appended to this document is the current regulatory language and potential language from other sources. Crucially, however, we would be very pleased to provide additional research and information relevant to these issues.

1. **On-Call Time**

Pennsylvania needs clear guidance for workers and employers about what time is compensable when a worker is on-call to work on short notice in an era of cellphones and emails; this is particularly timely in a year when many are working from home, around the clock, and lines about what is “on the clock” and “off the clock” get blurred. This is a nuanced area, but other states such as CA and the federal government have promulgated rules over the years that could serve as a framework for the Commonwealth.

However, this is an opportunity to go further in recognizing modern practices such as ‘just in time’ scheduling that is particularly disruptive to workers’ ability to coordinate any other necessary activities, such as childcare for workers’ children, school attendance for workers trying to secure better futures, or planning medical appointments. Such scheduling practices tend to happen in low wage workforces and cause undue stress on struggling families. Requiring advance notice of schedules makes good policy sense, along with penalties for failure to meet the notice requirement.

1. **Adopting clear rules for misclassified workers**

The misclassification of workers as non-employee “independent contractors” is rampant throughout the Commonwealth and the nation. As is widely known, independent contractor misclassification hurts workers (who are denied the most basic workplace protections and benefits), taxpayers (who must subsidize companies’ non-payment of social security taxes and unemployment insurance payments), and law-abiding businesses (who must compete with free-rider companies that circumvent their workplace obligations). We are in the midst of a “race to the bottom.” Each year, more and more companies unilaterally convert W-2 employees to independent contractors. The consequences are devastating. *See generally* David Weil, *The Fissured Workplace* (Harvard Press 2014); for more detail on a particular industry, see Stephen Herzenberg and Russell Ormiston, [*Illegal Labor Practices in the Philadelphia Regional Construction Industry*](https://www.keystoneresearch.org/sites/default/files/KRC%20Illegal%20Labor%20Con%20Final.pdf), Keystone Research Center, January 2019.

The current environment borders on the absurd. Blue collar workers who were once in labor unions – such as those who deliver bakery and snack food products to retail stores – must form “LLCs” and purchase their distribution routes. Janitors who clean retail stores must purchase their jobs through “franchise agreements” that many of them cannot even understand. Simply put, our laws have not kept up with evolving business models that have left tens of thousands of Pennsylvania workers without any PMWA or PWPCL rights.

Many states have grown tired of watching the “independent contractor” business model strip workers of basic wage and hour protections. These states have implemented “ABC tests” under which workers are presumed to be employees unless the putative employer can satisfy three independent requirements. For example, such an ABC test has been adopted for purposes of the New Jersey wage and hour laws and is described by the New Jersey Supreme Court as follows:  “The ‘ABC’ test presumes an individual is an employee unless the employer can make certain showings regarding the individual employed, including: (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.  [T]he failure to satisfy any one of the three criteria results in an 'employment' classification.” *Hargrove v. Sleepy’s, LLC*, 106 A.3d 449 (N.J. 2015).

New Jersey is not alone.  The above ABC Test has been adopted in other states, including California, Illinois, Massachusetts, and New York (for certain categories of workers)]. Nothing prohibits PALI from following adopting an ABC Test here in Pennsylvania. The time has come to do so.

1. **Joint Employment rules**

It is widely understood that employees suffer when large companies benefitting from the employees’ labor are able to avoid liability by paying the employees through sub-contractors, subsidiary companies, third-party staffing agencies, and franchisees.  The Economic Policy Institute’s current Policy Agenda frames the issue as follows:  “As employers outsource various functions to contractors and subcontractors, the workplace has become increasingly ‘fissured’ – meaning that two or more firms control the terms and conditions of employment (such as pay, schedules, and job duties). These arrangements enable employers to limit and evade liability for labor standards . . . making it nearly impossible for workers to enforce their rights . . . .”   and for unions to negotiate for better working conditions.”  *See* <https://www.epi.org/policy/#jobs> (February 5, 2018); *see also* David Weil, *supra*; *Fact Sheet: States with joint-employer shield laws are protecting wealthy corporate franchisers at the expense of franchisees and workers* (Economic Policy Institute Feb. 13, 2018) (available at <https://www.epi.org/publication/states-with-joint-employer-shield-laws-are-protecting-wealthy-corporate-franchisers-at-the-expense-of-franchisees-and-workers/>); *Report: Who’s the Boss: Restoring Accountability for Labor Standards in Outsourced Work* (National Employment Law Project May 7, 2014) (available at <https://www.nelp.org/publication/whos-the-boss-restoring-accountability-for-labor-standards-in-outsourced-work/>).

Recently, when the Trump administration enacted a Final Rule making it more difficult for workers to establish joint employment under the federal Fair Labor Standards Act, Pennsylvania Attorney General Josh Shapiro – joined by other state attorneys general – sued in federal court and obtained an injunction preventing the rule from going forward.  *See* *New York v. Scalia*, 2020 WL 5370871, 2020 U.S. Dist. LEXIS 163498 (S.D.N.Y. Sept. 8, 2020).  As the enjoined federal rule demonstrates, reliance on federal regulators to protect the rights of Pennsylvania workers is misplaced.  PALI should take this opportunity to implement clear and progressive rules ensuring that all business entities that control (either directly or indirectly) and benefit from an employee’s work can be liable for wage and hour violations.

In this regard, PALI is directed to Judge Wettick’s opinion in *Henderson v. University of Pittsburgh Medical Center*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 43 (Pa. Common Pleas, Allegheny Cty. Feb. 24, 2010).  In finding UPMC liable under the Wage Payment and Collection Law for the conduct of a subsidiary hospital, the Judge observed that “there is no reason why there cannot be more than one employer within the meaning of the Wage Payment Law where more than one entity is imposing the terms and conditions of plaintiffs employment.”  *Id.* at \*5.  Then, turning to the Minimum Wage Act, the Judge emphasized that the Act defines the term “employer” expansively “to include any person acting ‘***indirectly***, in the interest of an employer in relation to any employee.’”  *Id.* at \*10-11 (quoting 43 P.S. § 333.103(g)) (emphasis supplied).

Consistent with Henderson, PALI should enact a regulation that emphasizes that the definition of “employer” under both the Minimum Wage Act and the Wage Payment and Collection Law covers entities that exert direct or ***indirect*** control over the worker.

1. **White-collar exemption**

We request that the Department adopt a quantitative duties test that requires an employee to spend a certain percentage of work time performing exempt duties in order to qualify for one of the “white-collar” exemptions under the PMWA, 34 Pa. Code § 231.8 *et seq*.  These exemptions presently require that an employee perform exempt work as his or her “primary duty” in order to qualify for the exemptions.  This vague standard has led to inconsistent outcomes, and creates uncertainty for employers and employees alike.  It also incentivizes employers to avoid paying overtime by classifying workers who spend the vast majority of their time on non-exempt, routine and manual labor as exempt from overtime by simply assigning them minimal exempt duties (such as assistant managers in the retail sector).

Adopting a test that requires workers to spend a minimum percentage of their time performing truly exempt work will both clarify the existing standard and reduce incentives to misclassify workers.  In California, for example, employees must spend more than half of their time performing exempt work in order to qualify for the state’s white-collar exemptions.  *See* Cal. Code Regs., tit. 8, § 11040(1)(A)(1), 2(N); Cal. Lab. Code § 5l5(e).

**8. Better defining and strengthening the Department’s enforcement powers**

We urge the Department to review and utilize the power it has to issue decisions, collect records, and impose fines, to strengthen its investigators’ positions, and, where appropriate, to promulgate regulations in this regard. This is particularly important for workers who are on their own, without a legal representative, with nowhere else to turn for assistance. One possible area is the following:

43 Pa. Code §231,35 shall include the power to issue administrative subpoenas, enforceable in the Court of Common Pleas, to compel the production of documents and testimony to aid the Department’s enforcement powers under Section 7 and 9 of the Pennsylvania Minimum Wage Act.

**9.** **Expand and strengthen “notice” requirements**

If a worker does not know her rate of pay, regular payday, and who her employer is, she will be unable to make a complaint if pay goes missing. This is especially important for workers paid in cash or by a payment app, workers hired by a temp agency, workers with language barriers, and workers being trafficked.

34 Pa. Code §9.2 should be amended to include a proviso that the notification required by 43. P.S. § 260.4 as to the rate of pay, fringe benefits and wage supplements shall also be deemed to include a clear and concise description of the rate of overtime payable and that such notification must be given in writing to the affected employee at the time of the start of employment and thereafter prior to any changes in the rate of pay, fringe benefits, overtime pay and wage supplements, along with information identifying the employer and contact information, which must be updated if contact information changes or if employer changes.

**10. Prohibiting employers from changing employee pay rates from week-to-week in order to minimize overtime obligations**.

The Wage Payment and Collection Law requires employers to “notify … employes at the time of hiring of the time and place of payment and the rate of pay and the amount of any fringe benefits or wage supplements to be paid … and any change with respect to any of these items prior to the time of said change.” 43 P. S. § 260.4. Nevertheless, some employers attempt to circumvent overtime obligations by changing hourly pay rates after work is performed in order to keep an employee’s overall weekly wages the same regardless of hours worked. The Department should make clear that such ex post facto wage rate manipulation constitutes a violation of the WPCL notification requirement.

Absent written permission granted by the Department, any methodology utilized by an employer to dilute or reduce by any methodology an employee’s overtime rate of 150% of the employee’s regular rate is unlawful. The calculation of the regular rate shall include the employee’s hourly rate of pay and all other forms of compensation paid, including commissions and performance based bonuses or stipends. No forms of compensation paid to an employee for work suffered by the employee shall be excluded from the calculation of the regular rate.

**11. “Gap time” should be paid at the “regular rate” when employees work off-the-clock.**

“Gap time” is the term used to define the uncompensated work performed by an employee that falls in-between her last paid work hour and 40. Assume, for example that during a particular week, an employee works 45 hours but is only paid for 35 hours. The 5 unpaid hours above the 40-hour overtime threshold are clearly compensable at 150% of the employee’s regular rate. However, there is confusion over whether the PMWA mandates that the employee also be compensated at her regular rate (or, at least, at the minimum wage rate) for the 5 “gap time” hours falling between 35 and 40.

PALI should eliminate such confusion by implementing a regulation clarifying that, during any week in which overtime is worked, employees are entitled to be compensated at their regular rate for all gap time hours.

**12.**  **Establishing rules as to when travel time to and from a work place is compensable**

We request PALI consider revising the definition of “hours worked” in 34 Pa. Code § 231.1 to further define “time spent in traveling as part of the duties of the employe.” It should make clear that it encompasses time spent traveling to work places away from the premises of the employer. Further, when the employee begins or ends the day at such a worksite his or her travel time should be included as hours worked, except that the employer may deduct time that the employee would have spent commuting from his or her home community to the employer’s premises.

**13. Narrowing or modifying exemptions for amusement workers and agricultural workers**

Definition of “Labor on a Farm”: PALI should consider revisions to the definition of “Labor on a Farm” in 34 Pa. Code § 231.1 that narrow the definition by removing references to “horticultural commodity” and “horticultural commodities.” In doing so, PALI could determine that the MWA exemption applies to a more limited group of workers more clearly contemplated by the term “Labor on a Farm.” The current regulations closely mirror the FLSA definition of “Agriculture,” but this is not required by the statutory language, and an agency can use its expertise to interpret the governing statute. *See, e.g.,* *Vlasic Farms v. PLRB*, 565 Pa. 555 (Pa. 2001).

Amusement Park Workers: PALI should also consider amending the definition of “public amusement or recreational establishment” in 34 Pa. Code § 231.1 to exempt fewer workers from MWA protections. The current regulation can be used to exclude broad classes of workers—many of them vulnerable to exploitation—including carnival workers, lifeguards, pool cleaners, and summer camp counselors. Alternatively, PALI could examine whether there is a means of computing the duration or receipts in the exemption in a more narrow manner.

**Overlapping Wage Payment/Minimum Wage issues:**

**14. Inclusion of anti-retaliation provision**

The PA Minimum Wage Act provides for fines between $500 and $1000 for employers who discriminate or retaliate against workers “because such employe has testified or is about to testify before the secretary or his or her representative in any investigation or proceeding under or related to this act, or because such employer believes that said employe may so testify.” 43 P.S. § 333.112(a). PALI should consider implementing regulations that interpret this section broadly to include any worker who makes a good faith complaint, whether formally or informally, about any violation of this act to any government agency or court, or directly to the employer (which would presumably give the employer reason to believe that the worker might testify in a formal proceeding, as contemplated under the Act).

Although the WPCL does not include a similar, explicit anti-retaliation provision, it does give PALI “power to make rules and regulations for the administration of this act,” and existing regulation prohibits interference with the Department “in the enforcement” of the WPCL’s provisions. 43 P.S. § 260.8; 34 Pa. Code § 9.3. PALI should utilize this authority to create regulations prohibiting retaliation, which interferes with PALI’s ability to administer and enforce the WPCL.

Under both the MWA and WPCL, PALI should create regulations that specifically lay out the type of acts that constitute discrimination/retaliation. In particular, PALI should make clear that immigration-related threats are a form of retaliation punishable under the WPCL and MWA. In addition, under both laws, PALI should implement regulations that expand remedies for workers who have experienced retaliation, including reinstatement, backpay, and liquidated damages.

**15. Adoption of key Wage Payment and Collection Law regulations**

In addition to the MWA, the WPCL is a key piece of legislation that ensures workers are paid their earned wages on time. This right is especially essential to low-income workers who live paycheck-to-paycheck and are vulnerable to exploitation at the hands of labor traffickers, payday lenders, and others when earned pay is withheld or unauthorized deductions keep them bound in debt. The Department has promulgated few regulations to implement the WPCL. Additional regulations are necessary to clarify the rights of workers under this law.

34 Pa. Code §9.2 should be amended to include a proviso that all wage claims either arising under the PMWA or because of a violation of the PMWA or its regulations at 34 Pa. Code §231 may be brought under the PWPCL, 43 P.S. §260.1 *et. seq.* Courts have adopted such an interpretation that a failure to pay wages owed under the PMWA likewise constitutes a violation of section 3 of the Wage Payment and Collection Law (43 P. S. § 260.3) and may therefore serve as a predicate for a WPCL claim under 43 P.S. § 260.9a. PALI should affirm this interpretation and clarify that this includes a shortage of payment caused by any violation of the MWA, including but not limited to failure to pay for on-call or travel time, failure to pay overtime wages as a result of classifying an employees as an exempt salaried worker contrary to law, or failure to pay employee wages or benefits as a result of misclassification of that employee as an independent contractor.

Because an employee cannot contract away his or her rights under the MWA or WPCL, an employee need not assert an explicit contractual agreement between the employer and employee asserting rights to minimum and overtime wages already provided for in the MWA. PALI should clarify that any employment contract must already implicitly contain such terms.

The WPCL does, however, require that an employer demonstrate an explicit authorization for deductions from wages. *See* WPCL 260.3 (authorizing an employer to take from wages “deductions provided by the law, or as authorized by regulation of the Department of Labor and Industry for the convenience of the employe”). But the law requires more clarification as to what constitutes a deduction from earned wages as opposed to a reduction or fluctuation in salary from week to week. *See Ressler v. Jones Motor Co.*, 487 A.2d 424 (Pa. Super. Ct. 1985). The WPCL contains no definition of the term “deduction,” and therefore all guidance comes from regulations at 34 Pa. Code § 9.1 specifying a list of “authorized deductions.” This list provides a catch-all provision that leaves open “Such other deductions authorized in writing by employes as *in the discretion of the Department is proper and in conformity with the intent and purpose of the Wage Payment and Collection Law*.” 34 Pa. Code § 9.1(13). PALI should establish a process whereby an employer can seek advance approval from the Department for particular deductions falling with this “other deductions” provision, or the employe can directly challenge before the Department the propriety of a deduction that is not “proper and in conformity with the intent and purpose of the Wage Payment and Collection Law.”

**16. Clarifying that every week is a separate violation**.

PALI should clarify that in accordance with section 10 of the Wage Payment and Collection Law (43 P. S. § 260.10), each event specified in the law (where a regularly scheduled payday passes and wages owed remain unpaid for 30 days; an employe files a claim and wages remain unpaid for 60 days; an agreement, agreement, award or other act making wages payable is executed but wages remain unpaid for 60 days; or a calendar quarter passes in which shortages in the wage payments made exceed 5% of the gross wages payable on any two regularly scheduled paydays) is a separate violation of the WPCL giving rise to liquidated damages equal to twenty-five percent (25%) of the total amount of wages due, or five hundred dollars ($500), whichever is greater. Where a wage shortage could arguably be described as falling under multiple of these event types--like shorting workers by >5% for multiple paydays >30 days in the same calendar quarter--the benefit should go to the employee who can collect the higher amount of damages.

**17. Restating prior position that immigration status is irrelevant**

It has been PALI’s unwritten policy to affirm that immigration status is not relevant in the application of the MWA and WPLC to employees. The PALI should formalize its policy of neither inquiring into the immigration status of employees nor considering immigration status in determining MWA and WPCL coverage. A formalized policy will make the fact that undocumented workers are entitled to the protections of the Pennsylvania wage laws, including anti-retaliation provisions, unequivocal for both employees and employers in the state.

**18. Recordkeeping requirements:**

PALI should make clear that the burden is on employers to maintain records consistent with Pennsylvania wage laws, and consider establishment of a burden-shifting structure in which, when employers fail to comply with recordkeeping requirements, employees can present any available evidence for PALI’s use in investigations and enforcement.

Submitted by:

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**APPENDIX:  TIPPED WORKERS**

**CURRENT LANGUAGE OF THE PMWA:**

§ 333.103. Definitions

In determining the hourly wage an employer is required to pay a tipped employe, the amount paid such employe by his or her employer shall be an amount equal to: (i) the cash wage paid the employe which for the purposes of the determination shall be not less than the cash wage required to be paid the employe on the date immediately prior to the effective date of this subparagraph; and (ii) an additional amount on account of the tips received by the employe which is equal to the difference between the wage specified in subparagraph (i) and the wage in effect under section 4 of this act. The additional amount on account of tips may not exceed the value of tips actually received by the employe. The previous sentence shall not apply with respect to any tipped employe unless:

(1) Such employe has been informed by the employer of the provisions of this subsection;

(2) All tips received by such employe have been retained by the employe and shall not be surrendered to the employer to be used as wages to satisfy the requirement to pay the current hourly minimum rate in effect; where the gratuity is added to the charge made by the establishment, either by the management, or by the customer, the gratuity shall become the property of the employe; except that this subsection shall not be construed to prohibit the pooling of tips among employes who customarily and regularly receive tips.

43 P.S. § 333.103(d)

**REGULATIONS/CASELAW TO POTENTIALLY EMULATE:**

**Philadelphia Gratuity Protection Bill:**

Payment of Gratuities to Employees

(1)   *Definitions.*

      (a)   *Gratuity.* Money paid or given to or left for an employee by a patron of a business over and above the amount due the business for services rendered to the patron or for goods, food, drink, or articles sold or served to the patron.

(2)   *Required and Prohibited Practices.*

      (a)   Every gratuity shall be the sole property of the employee or employees to whom it was paid, given, or left for, and shall be paid over in full to such employee or employees. No employer may deduct any amount from wages due to an employee on account of a gratuity, or require an employee to credit the amount, or any part thereof, of a gratuity against and as a part of the wages due to the employee from the employer.

      (b)   An employer that permits patrons to pay gratuities by credit card shall pay employees the full amount of the gratuity that the patron indicated on the credit card slip, without any deduction for any credit card payment processing fees or costs that may be charged to the employer by the credit card company. Payment of gratuities made by patrons using credit cards shall be made to the employees not later than the next regular payday following the date the patron authorized the credit card payment.

      (c)   Nothing in this Section shall prohibit an employer from adopting and enforcing a policy under which gratuities are pooled and distributed among all employees who directly provide service to patrons.

*Phila. Code § 9-614*

**Fair Labor Standards Act:**

“An employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees’ tips, regardless of whether or not the employer takes a tip credit.”

*29 U.S.C. § 203(m)(2)(B)*

“‘Tipped employee’ means any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips.”

*29 U.S.C. § 203(t)*

“[W]here the facts indicate that tipped employees spend a substantial amount of time (i.e., in excess of 20 percent of the hours worked in the tipped occupation in the workweek) performing such related duties, no tip credit may be taken for the time spent in those duties.  All related duties count toward the 20 percent tolerance.”

*U.S. Department of Labor, Wage & Hour Division, Field Operations Handbook at § 30d00(f)(3) (Dec. 1, 2016)*

**California Code, Rules and Regulations:**

No employer or agent shall collect, take, or receive any gratuity or a part thereof that is paid, given to, or left for an employee by a patron, or deduct any amount from wages due an employee on account of a gratuity, or require an employee to credit the amount, or any part thereof, of a gratuity against and as a part of the wages due the employee from the employer. Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for. An employer that permits patrons to pay gratuities by credit card shall pay the employees the full amount of the gratuity that the patron indicated on the credit card slip, without any deductions for any credit card payment processing fees or costs that may be charged to the employer by the credit card company. Payment of gratuities made by patrons using credit cards shall be made to the employees not later than the next regular payday following the date the patron authorized the credit card payment.

*Cal. Labor Code Section 351*

**New York Code, Rules, and Regulations:**

146-2.14. Tip sharing and tip pooling.

(a) Tip sharing is the practice by which a directly tipped employee gives a portion of his or her tips to another service employee or food service worker who participated in providing service to customers and keeps the balance.

(b) Tip pooling is the practice by which the tip earnings of directly tipped employees are intermingled in a common pool and then redistributed among directly and indirectly tipped employees.

(c) Directly tipped employees are those who receive tips from patrons or customers without any intermediary between the patron or customer and the employee.

(d) Indirectly tipped employees are those employees who, without receiving direct tips, are eligible to receive shared tips or to receive distributions from a tip pool.

(e) Eligibility of employees to receive shared tips, or to receive distributions from a tip pool, shall be based upon duties and not titles. Eligible employees must perform, or assist in performing, personal service to patrons at a level that is a principal and regular part of their duties and is not merely occasional or incidental. Examples of eligible occupations include: (1) wait staff; (2) counter personnel who serve food or beverages to customers; (3) bus persons; (4) bartenders; (5) service bartenders; (6) barbacks; (7) food runners; (8) captains who provide direct food service to customers; and (9) hosts who greet and seat guests.

(f) Employers may not require directly tipped employees to contribute a greater percentage of their tips to indirectly tipped employees through tip sharing or tip pooling than is customary and reasonable.

*New York Hospitality Industry Wage Order § 146-2.14*

146-2.18. Charge purported to be a gratuity or tip.

13Section 196-d of the New York State Labor Law prohibits employers from demanding, accepting, or retaining, directly or indirectly, any part of an employee’s gratuity or any charge purported to be a gratuity.

 (a) A charge purported to be a gratuity must be distributed in full as gratuities to the service employees or food service workers who provided the service.

(b) There shall be a rebuttable presumption that any charge in addition to charges for food, beverage, lodging, and other specified materials or services, including but not limited to any charge for “service” or “food service,” is a charge purported to be a gratuity.

(c) Employers who make charges purported to be gratuities must establish, maintain and preserve for at least six years records of such charges and their dispositions.

(d) Such records must be regularly made available for participants in the tip sharing or tip pooling systems to review.

*New York Hospitality Industry Wage Order § 146-2.18*

§ 146-2.19 Administrative charge not purported to be a gratuity or tip.

(a) A charge for the administration of a banquet, special function, or package deal shall be clearly identified as such and customers shall be notified that the charge is not a gratuity or tip.

(b) The employer has the burden of demonstrating, by clear and convincing evidence, that the notification was sufficient to ensure that a reasonable customer would understand that such charge was not purported to be a gratuity.

(c) Adequate notification shall include a statement in the contract or agreement with the customer, and on any menu and bill listing prices, that the administrative charge is for administration of the banquet, special function, or package deal, is not purported to be a gratuity, and will not be distributed as gratuities to the employees who provided service to the guests. The statements shall use ordinary language readily understood and shall appear in a font size similar to surrounding text, but no smaller than a 12-point font.

(d) A combination charge, part of which is for the administration of a banquet, special function or package deal and part of which is to be distributed as gratuities to the employees who provided service to the guests, must be broken down into specific percentages or portions, in writing to the customer, in accordance with the standards for adequate notification in subdivision (c) of this section. The portion of the combination charge which will not be distributed as gratuities to the employees who provided service to the guests shall be covered by subdivisions (a), (b) and (c) of this section.

*New York Hospitality Industry Wage Order § 146-2.19*

**Caselaw:**

“No Pennsylvania appellate or trial court has had occasion to interpret the phrase ‘customarily and regularly receive tips’ in 43 P.S. § 333.103(d).  Nevertheless, in light of the federal appellate rulings in Roussell, Shahriar and Myers, the foregoing holdings of the district courts in Arkansas, Florida, Illinois, Kansas, Maryland, New York, Oklahoma, Tennessee and Texas, the well-reasoned opinions by Judge Munley in the companion federal litigation, and the U. S. Department of Labor’s Operations Handbook and Opinion Letter, ***we conclude that direct customer interaction is a relevant factor in determining whether employees ‘customarily and regularly receive tips’ for purposes of tip pool eligibility under Section 3(d) of the MWA***.”

*Ford v. Lehigh Valley Rest. Grp., Inc., 47 Pa. D. & C.5th 157, 181 (Laka. Cty. C.P. 2015) (emphasis supplied)*

**IDEAS TO UPDATE REGULATIONS:**

1.     Define “Tips and Gratuity” – “Money paid or given to or left for an employee by a patron or customer of a business over and above the amount due the business for services rendered to the patron or for goods, food, drink, or articles sold or served to the patron.  There shall be a rebuttable presumption that any charge in addition to charges for food, beverage, lodging, and other specified materials or services, including but not limited to any charge for ‘service’ or ‘food service,’ is a charge purported to be a tip or gratuity.” – Taken in large part from Philadelphia Gratuity Protection Bill and New York Regulation (Note:  I added “or customer” and “tip” to “tip or gratuity”).

2.     Prohibit Deduction of Credit Card Fees from Tips – “An employer that permits patrons or customers to pay tips or gratuities by credit card shall pay employes the full amount of the tips or gratuity that the patron or customer indicated on the credit card slip or receipt, without any deduction for any credit card payment processing fees or costs that may be charged to the employer by the credit card company.  Payment of tips or gratuities made by patrons or customers using credit cards shall be made to the employes not later than the next regular payday following the date the patron or customer authorized the credit card payment.”  – Taken in large part from Philadelphia Gratuity Protection Bill (Note:  I added “or customer”, added “tips” to go along with “gratuities”, and made the spelling of “employees” consistent with language of the statute).

3.     Define “employes who customarily and regularly receive tips” –  “‘Employes who customarily and regularly receive tips’ for purposes of 43 P.S. § 333.103(d) means employes must perform, or assist in performing, direct personal service to patrons at a level that is a principal and regular part of their duties and is not merely occasional or incidental.  An employer may not keep tips received by its employes for any purposes, including allowing managers or supervisors to keep any portion of employes’ tips even if the manager or supervisor provides direct personal service to patrons at a level that is a principal and regular part of their duties.  Any tips or gratuities that are distributed as part of a valid tip pool to employes who customarily and regularly receive tips must be done so in a reasonable manner in proportion to the amount of service the employee provided to the customer.”  – Taken in large part from New York Hospitality Order, court interpretations of California Regulations, and the FLSA (Note:  I adjusted spelling of “employee”)

4.     Define “tipped employe” –  “‘Tipped employe’ for purposes of 43 P.S. § 333.103(d) means any employe engaged in an occupation in which he/she customarily and regularly receives more than $140 a month in tips.  However, where the facts indicate that tipped employes spend a substantial amount of time (i.e., in excess of 20 percent of the hours worked as a tipped employe in the workweek) performing non-tip producing duties, no tip credit may be taken for the time spent in those duties.” – Taken in large part from FLSA (Note:  I adjusted spelling of “employee”, added “he/she” and made the limit $140, and replaced tipped occupation with “tipped employe”)

5.     Address Service Charges so Customers Know it will Not be Given to Workers as Tips – Take regulation directly from New York Hospitality Order above.

6.     Prohibit employers from taking credit if any rules violated, i.e. full MW due – Any violation of tip credit or tip pooling provisions results in full minimum wage being due to workers.

7.     Require transparency if engaged in tip pooling – written policies must be available to staff, records of all tips earned and distributed available to any participating staffer upon request within 2 weeks of request. Subject employers to fines for violations.